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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 459th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 24 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 13 (continued)

1. The CHAIRMAN reminded the Commission that at the previous meeting it had begun considering the basic approach of article 13 to the question of the money-back guarantee. He felt that his suggestion that the first sentence of article 13(2) should provide for an exception to the general rule was useful in meeting the criticism expressed by the observer for the Banking Federation of the European Community to the rigid nature of the rule as presently worded.

2. Mr. SCHNEIDER (Germany) said he had three problems with the article. Firstly, he was concerned at its implications for the insolvency of a bank in the credit transfer chain. Secondly, he was afraid that if credit transfers were perceived to be a high-risk procedure, banks would advise their customers to use cheques instead in order to escape the money-back guarantee liability. That would negate the purpose of the Model Law, which was to encourage international credit transfers. Finally, he thought that the Model Law should be consistent with company and labour law. He could envisage a situation in which an employee of a bank might be liable to reimburse to his employer the amount of a payment order he had accepted, or in which a director might be held to be in breach of his duty of care. The element of discretion contained in the Chairman's suggestion should therefore be incorporated into the article.

3. His delegation believed in the principle of freedom of contract. The mandatory rule in article 13(2) should contain a proviso which allowed the customer some possibility of choice in the matter. Banks should be permitted to offer two credit transfer services, one with and one without a money-back guarantee. Since the money-back guarantee involved risk to the bank, it could charge for that risk. The customer could choose whether or not to pay for the money-back guarantee. Accordingly, on the assumption that the first sentence of paragraph 2 of article 13 would read as suggested by the Chairman at the previous meeting (A/CN.9/SR.458, para. 68), he proposed the insertion after that sentence of a provision reading along the following lines: "They may also be varied if the receiving bank has offered to the originator to accept payment orders including the duty to refund as laid down in article 13, paragraph (1)."

4. Another concern of his delegation was the relationship between the article and deposit insurance schemes, which were national rather than international in their operation and related only to non-bank claims. Under article 13(1), since the originator would have no direct claim to funds from an intermediary bank, in the event of the latter's insolvency those funds would not be insured under the applicable deposit insurance scheme. To address the situation where either one or more intermediary banks were insolvent, he suggested the addition, after the last sentence of article 13(1), of words expressing the idea that the originator was entitled to the return of any funds which were in the hands of an intermediary bank. That would allow him a direct claim against an intermediary bank.

5. Mr. FELSENFELD (United States of America) said he welcomed the original and constructive suggestion made by the Chairman. He was also sympathetic to the need for freedom of contract reflected in the first proposal made by the representative of Germany. His delegation had problems with both suggestions, however, because of the new ideas they contained. Banks might oppose the idea of a money-back guarantee as a continuing risk, while customers, whether corporate entities or individuals, might regard it as limiting their entitlement to damages. He therefore felt that the two suggestions needed full discussion not only by the Commission but by the parties affected.

6. Mr. CRAWFORD (Canada) said banks in his country had no objection to the money-back guarantee, since they already faced such a situation under article 4A of the Uniform Commercial Code of the United States. His delegation's problem was that the suggested provisos would allow banks to evade liability. In the case of the German proviso, banks could price the money-back guarantee option at such a level that the originator would be discouraged from using that option. In the case of the Chairman's suggestion, receiving banks might, as a matter of routine, stipulate a clause negating the money-back guarantee in favour of the originating bank in circumstances where a prudent organization might have declined to accept the payment order. That would throw the onus on to the originator to demonstrate, in the courts, that exceptional circumstances did not apply. Both provisos might thus have the effect of frustrating the intention of the Model Law.

7. The Model Law was intended to encourage trust in the banking system. That being so, there was no need for it to provide for a money-back guarantee to an originator which was a bank, since banks formed part of the system. Statistics showed that the number of payments made vastly exceeded the number of underlying commercial transactions, so the incidence of the money-back guarantee would be greatly reduced.

8. Mr. ABASCAL ZAMORA (Mexico) preferred the text prepared by the Working Group. Introducing a reference to a prudent bank would create uncertainty in interpretation. It was important to take account of the need to protect the customer. It was the customer who would have to take action for the return of his money, in some cases against an intermediary bank which he did not know and with which he had no relationship. The addition of the sentence suggested by the Secretariat in its comments (A/CN.9/346, p. 75, para. 22) deserved consideration.

9. Mr. JANSSON (Observer for Sweden) said that in his country banks operated the money-back guarantee and in business circles it was regarded as an integral part of the Model Law. He agreed with the representative of Canada about the negative effects which might arise from putting a price on the money-back guarantee. Accordingly, he could not support the first proposal made by the representative of Germany.

10. The exception suggested by the Chairman would be acceptable to his delegation, provided that it was worded in such a way as to make it very clear that the money-back guarantee would cease to apply only in exceptional individual circumstances.

11. Mr. TCHERNYCHEV (Union of Soviet Socialist Republics) said that article 13 as drafted by the Working Group presupposed that the originator's bank would pay the originator in any event in which the transfer was not effected - even if the intermediary bank could not pay. It seemed, however, that the originator's bank would not be so obligated in the event of the bankruptcy of the intermediary bank. The proposal of the representative of Germany on that subject therefore deserved consideration.

12. Mr. GRIFFITH (Observer for Australia) endorsed the comments made by the observer for Sweden about the Chairman's suggestion.

13. Mr. LOJENDIO OSBORNE (Spain) said that the exception contained in the second sentence of article 13(2) should be extended to include the case where the originator specified an intermediary bank. In doing so, the originator assumed a risk and in that case the receiving bank should not be liable to him for the consequences. The effect would be to reduce the money-back guarantee.

14. Mr. IWAHARA (Japan) said that he could accept the proviso suggested by the Chairman if it was modified to reflect the comment made by the observer for Sweden. Basically the money-back guarantee should be mandatory and ought to be a matter of policy in any international payments system, but certain exceptions to the obligation should be permissible. For example, should an originator wish very strongly to make a high-risk international credit transfer, the originator's bank should be entitled to contract out of its duty to refund rather than have to refuse the payment order on the ground of its potential liability.

15. Ms. KOSKELO (Observer for Finland) submitted that duty to refund would be an important confidence-building element in any viable international credit transfer system, especially where originators who were not banks were concerned. She shared the doubts voiced by the representative of Canada regarding the German proviso: there was a serious risk that the variant which included the money-back guarantee would be priced prohibitively. She could accept the exception suggested by the Chairman, the advantage of which would be that the customer would truly understand what choice he was being offered and appreciate the circumstances under which it would be permissible for a bank to deviate from its duty to refund. It should, however, be rendered explicit in the text that for those circumstances to pertain, there must be an unusual and significant risk involved in the credit transfer, by which she meant at any stage of that process, and not just at the outset.

16. Ms. JAMETTI GREINER (Observer for Switzerland) said that her Government had expressed very serious reservations about the duty to refund in its written comments (A/CN.9/347, p. 52). Those reservations persisted, albeit in a somewhat attenuated form as a consequence of the Chairman's suggestion. The notion of a money-back guarantee was not compatible with all banking systems. For what was, at best, to be only a Model Law, all chances of securing reciprocity must be exploited to the full, and for that reason she inclined towards acceptance of the German proviso, which took account of differences in banking systems and allowed for a certain flexibility in the rule without affecting its primary goal; it seemed to her to constitute a wise compromise, opening the way for the customer to make an informed choice.

17. Mr. GREGORY (United Kingdom) submitted that the money-back guarantee constituted an important part of a bargain whereby the provisions of the Model Law, while catering in large measure for banking interests and concerns, were also expected to reflect what might appositely be termed the other side of the coin. All questions of liability set aside, it was integral to the structure of the draft that if interest were to go to the beneficiary upon completion of the credit transfer, then the subject-matter of the transfer should be returned to the originator in case of non-completion.

18. Nevertheless, the serious concerns voiced about the duty to refund, in particular by the representative of Germany and the observer for Switzerland, must be addressed squarely. The United Kingdom delegation would be reluctant to see the money-back guarantee weakened in the absence of adequate safeguards; the appropriate course might be to accept the proviso suggested by the Chairman, modified to take account of the remarks made by the observer for Finland. The suggestion contained in the Secretariat's commentary on article 13 (A/CN.9/346, p. 75, para. 22) might also be indirectly of assistance in ensuring that banks would not systematically contract out of their duty to refund. He believed that only the originator and the originator's bank should be permitted to avail themselves of the option which would be afforded by the proviso which he was recommending. If they did not do so, it would make no sense for intermediaries further down the chain to contract out of the duty to refund.

19. Mr. TARKO (Observer for Austria) said that his views were similar to those expressed by the representative of Germany and the observer for Switzerland. He believed that article 13 should provide exceptions to the mandatory duty to refund. The proviso suggested by the Chairman might be acceptable, but its present wording could lead to divergent interpretations, whereas the German proviso had the merit of offering parties the alternatives of a transfer with or without a money-back guarantee.

20. Mr. DE BOER (Netherlands) agreed with the representative of Canada that the cost to the customer of opting for a money-back guarantee under the German proviso might be prohibitively high, and that systematic evasion of their liability by banks might be the result. He approved the text put forward by the Chairman, with a modification along the lines which had been suggested during the discussion.

21. Mr. JOLEC (Observer for Czechoslovakia) approved the proviso suggested by Germany. It was consistent with the principle of freedom of contract and reflected current banking policy and practice in the matter of credit transfers.

22. Mr. BURMAN (United States of America) said that the basic proposition in article 13 was very close to that selected for United States domestic law; it reflected a fundamental compromise with commercial users and was an element of what the United Kingdom representative had referred to as a "bargain". Any exception which was provided to a guarantee, however reasonable, obviously changed the nature of that guarantee. The concerns voiced in the discussion indicated that the matter required further careful scrutiny.

23. The CHAIRMAN noted from a show of hands that the prevailing view seemed to be that the Commission should continue to seek a text for paragraph 2 of article 13 in which the first sentence of the paragraph would contain a more stringent formulation of the proviso he had suggested at the previous meeting (A/CN.9/SR.458, para. 68). Accordingly, he invited the Commission to consider the following wording for that sentence: "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a particular order due to exceptional circumstances because of an unusual risk involved in the credit transfer."

24. In reply to a question put by Mr. CRAWFORD (Canada), the CHAIRMAN exressed the opinion that the wording he had just suggested would eliminate the risk of originator's banks systematically including exculpatory clauses in their terms of business for credit transfers; and that it would render further reference to that eventuality superfluous.

25. Mr. BONELL (Observer for Italy) said that he had some difficulty in understanding the reference to prudence in the Chairman's text and even greater difficulty in reconciling it with the mention of exceptional circumstances and unusual risk.

26. Mr. SCHNEIDER (Germany) preferred the Chairman's original suggestion for the first sentence of article 13(2). Prudent banking was a concept relevant to the matter under discussion; the new wording watered down the concept and limited the possibility of interpreting it. Cases which could by no means be qualified as exceptional might well occur in which it would be imprudent to make international credit transfers.

27. He believed that the Canadian objection to his own delegation's proviso might be overcome by including in it a reference to an adequate price.

28. Mr. CRAWFORD (Canada) said that in his view prudent banking was not a generally recognized criterion but that a court might equate it with reasonable conduct on the part of a bank.

29. He was not sure that it would be advisable, if the Chairman's new wording was accepted, to retain in article 13(2) the exclusion which it contained at present.

30. Mr. ABASCAL ZAMORA (Mexico) shared the views expressed by the observer for Italy. There might be several different ways of interpreting the notion of prudence. He saw no unambiguous definition of the term in law. The Model Law must be quite clear on the matter of the duty to refund.

31. Ms. JAMETTI GREINER (Observer for Switzerland) said that in her view the Chairman's original suggestion had much to recommend it.

32. The CHAIRMAN said that he would reintroduce his original suggestion for the first sentence of paragraph 2 of article 13 with a slight modification. It now read: "The provisions of paragraph (1) may not be varied by agreement, except where a prudent originator's bank would not have otherwise accepted a

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particular payment order because of a significant risk involved in the credit transfer". The Commission would note that the only change was the replacement of the words "execution of that payment order" by the words "credit transfer".

33. Mr. GREGORY (United Kingdom) said he thought it necessary, since the proviso no longer mentioned exceptional circumstances and unusual risk, that the paragraph should include a reference to the systematic use of the provisions of paragraph 1 of the article.

34. Mr. FELSENFELD (United States of America) agreed.

35. Mr. GRIFFITH (Observer for Australia) supported the views expressed by the two previous speakers. He would be prepared to support a text worded along the lines just indicated by the Chairman, but he believed that the Drafting Group should review it before the Commission considered it further.

36. Mr. ERIKSSON (Observer for Sweden) said that the addition to the modified form of the Chairman's original proviso of the words "due to exceptional circumstances" would make its intention clearer. Without it, the text might suggest that a bank could enter into arrangements varying its duty to refund in all cases in which it was dealing with a particular country. In his view, that should not be allowed.

37. Mr. SCHNEIDER (Germany) pointed out that the issue was not simply a drafting problem but concerned the situation in the European Economic Community, in which standard contracts would most probably be introduced in the near future.

38. Mr. SOLIMAN (Egypt) observed that article 13 dealt with the non-completion of a credit transfer; for example, because the payment order was cancelled, because an error occurred or because certain conditions were placed on it. Small banks were the most likely to lose in such situations. The present drafting of the text was very comprehensive and he found it perfectly satisfactory.

39. Mr. BONELL (Observer for Italy) said that, in his opinion, the second sentence of article 13(2) should be retained. He suggested that the text of article 13 might be clearer if the existing first sentence of paragraph 2 was deleted and a third paragraph was added concerning the possibility of agreements which varied the obligation to refund.

40. Mr. AL-NASSER (Observer for Saudi Arabia) said that the question of differences in exchange rates should be mentioned in dealing with the topic under consideration.

41. The CHAIRMAN asked the Commission if it wished to adopt, for addition to the first sentence of article 13(2) as proposed by the Working Group, the modified formulation of his original proviso for that sentence, namely the

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words "except where a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer".

42. It was so agreed.

43. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 13(2) mentioned the suspension of payment or the prevention of a refund by an intermediary bank. Since those steps might also be the act of the beneficiary's bank, the sentence should refer to the beneficiary's bank as well.

44. Another matter to which the Commission should devote attention in considering article 13 was that a difficulty could arise with a credit transfer, not as the result of a fault of the originator, the intermediary bank or the beneficiary's bank, but simply owing to a failure of the message transmission system.

45. Mr. ABASCAL ZAMORA (Mexico) said that the change suggested by the Banking Federation of the European Community seemed to imply that article 13 offered no money-back guarantee if an intermediary bank was unable to receive funds from the beneficiary's bank. In his view, that eventuality might arise in two ways: first, if the intermediary bank sent funds in advance to the beneficiary's bank and for some reason the money could not be refunded; and secondly, if the intermediary bank sent the beneficiary's bank funds but a revocation order supervened. Was the suggested amendment intended to cover those two cases?

46. The CHAIRMAN said that it seemed logical that the person who specified a beneficiary's bank should bear the same risk as the person who specified an intermediary bank.

47. Mr. CRAWFORD (Canada) said that, though the second sentence in article 13(2) might appear to support the Chairman's view, practical considerations might have more weight.

48. Mr. FELSENFELD (United States of America) pointed out that some of the questions under discussion would also arise in connection with article 17. A form of words might possibly be found to cater for the point raised by the Mexican representative, but perhaps the best course would be to leave the second sentence of article 13(2) as it was.

49. Mr. GREGORY (United Kingdom) shared the point of view expressed by the Canadian representative. Article 13(1) was capable of applying to the beneficiary's bank in very limited circumstances, but article 13(2) should not so apply.

50. Mr. BOSSA (Observer for Uganda) asked whether the originator's bank mentioned in the first sentence of article 13(1) and the receiving bank mentioned in the second sentence of article 13(2) were one and the same.

51. The CHAIRMAN pointed out that, under article 2(g), the term "receiving bank" included both the originator's bank and the beneficiary's bank.

52. He asked the Commission whether it accepted the suggestion to include a reference to the beneficiary's bank in the second sentence of article 13(2).

53. The suggestion was rejected.

The meeting rose at 12.35 p.m.